THE CENTRAL INTELLIGENCE AGENCY:
THE KING'S MEN AND THE CONSTITUTIONAL ORDER

Robert Borosage

The "Grand Inquest" into the crimes and abuses of President Nixon taught us what we should have learned from the war in Indochina: lawlessness is the prerogative of power. Now, it is imperative that the inquiry turn from the usurpations of one man to the ominous powers and policies of the institutions which form the basis of the "imperial Presidency," and which so greatly imperil our freedom and liberty. No executive institution demands immediate investigation more than the Central Intelligence Agency,"'the King's Men' or 'President's Army'" established in the White House, engaged in lawless clandestine activities throughout the world, its grey and furtive world hidden from public or Congressional control by an unprecedented secrecy.[1]

Any review of executive institutions should be concerned with defining limits upon the executive power, limits which befit the preservation of a republican form of government. No more perfidious idea has been propogated than the cold war view that our constitution could adapt itself to any institutional "requirement" without abandoning its essential character. Like any form of government, a republican order imposes limits, limits based upon traditional and accepted principles. A consistent violation of those limits presages an alteration of the political order itself.

In this paper, I shall concentrate on the simple and the obvious. I shall contrast the basic principles of our constitutional order, with the

governing rules of the Central Intelligence Agency. I do so not to create a lawyer's brief that the CIA is unconstitutional, but to put forth a citizen's view that the CIA is not only incompatible with, but also a threat to a republican order. I take time for this simple approach in the belief that only by returning to first principles can we, in a time of turmoil and fear, begin to regain control of our institutions before we become the pawns and victims of their purposes.

I

Every form of government possesses certain essential traits, principles which distinguish it from others. Moreover, every country might be said to have its own "spirit of the laws," its own basis of legitimacy which inheres in its laws, in the opinion of its citizenry, the actions of its leaders, in its traditions, history and culture.

Our constitution established a republican form of government for the nation. The republic was founded on a rather pessimistic view of political man, and a mechanistic, Newtonian scheme of government. Man was viewed as ambitious, corrupt and corruptible, prone to unwise passions and foolish aspirations. To protect the polity from the designs of the ambitious or the corruption of the venal, the consititutional order established a system of checks and balances, a separation of powers and functions among the legislature, the executive and the judiciary. The basic concept of checks and balances was designed, as Justice Brandeis reminded us, "not to promote efficiency, but to preclude the exercise of arbitrary power."[2]

The second fundamental principle of the republic was that all would be subject to the rule of the law. As Corwin noted, "The colonial period

ended with the belief prevalent that the 'executive magistracy' was the natural enemy, the legislature usually the natural friend of liberty."[3] Thus, in a republican order, "the legislative authority necessarily predominates."[4] The legislature would be the "engine" of the republic, passing laws for the executive to execute, laws which would empower the executive to act, limit the scope of its discretion, and the means of its action. The legislature would control the purse, and the power of taxation. Moreover, the legislature would constitute a continuing inquest into the affairs and activities of the executive and the polity, to insure that its laws were carried out, that its provisions were sufficient, and to guard against corruption, abuse of power, or usurpation.*

The spirit of the American laws added to these basic principles of the republic. Hannah Arandt, addressing Montesquieu's conception of a spirit of the laws, concluded that

> consent, not in the very old sense of mere acquiescence with its distinction between rule over willing subjects and rule over unwilling ones, but in the sense of active support and continuing participation in all matters of public interest, is the spirit of American law.[5]

Active consent and participation requires that information about the government's activities be readily available. Beyond an injunction against secrecy, however, an active consent also requires arenas - town halls, clubs, associations, assemblies, demonstrations - in which the citizenry can meet, exchange their views on the subjects of government,

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*For Montesquieu, a leading mentor of the colonial mind, the legislative and the executive were assumed to operate on different principles. The governing principle of monarchy (whether elective, constitutional or hereditary) was honor - thus a monarch would be concerned with grandeur, with putting his or her subjects to tasks of sufficient magniture to bring glory and awe to the regime. The governing principle of a republic was virtue; a true republican would be satisfied with the development of virtuous men in the polity.

and vote on matters of interest. Consent without information is acquiescence in ignorance; consent without discussion and decision is approval without citizenship or politics.

Needless to say, we have moved far from these basic principles of government. Madison's fear of legislative tyranny has now been replaced by the very real threat of executive autocracy. The Presidency - under Nixon, virtually a fourth branch of the government unto itself - has become dominant and domineering. The executive has assumed the initiative in the legislative process, and slowly captured more of the power of the purse. Secrecy now far outweighs voluntary disclosure. The citizenry acts more as an audience than as participants in government. Local assemblies have withered and died. And, in national security matters, the executive acts with virtual independence, with a freedom and license a Tudor king would have applauded.

The historical basis for this profound alteration has been emergency: economic depression at home and war abroad. Its legal expression has been either claims of inherent executive power, or broad delegations of power by the Congress. Its institutional base has been the burgeoning bureaucracies and the growth of national and multinational corporations. The United States has been in a state of national emergency since 1933. Presidential license, which grew to meet the economic crisis of the Great Depression, became supreme in war.

Years ago, DeTocqueville warned the young republic that

> "war does not always give democratic societies over to military government, but it must invariably and immeasurably increase the powers of divil government... If that does not lead to despotism by sudden violence, it leads men gently in that direction by their habits. All those who seek to destroy the freedom of the democratic nations must know that war is the surest and shortest means."

The experience after World War II illustrated the validity of his warning.

After World War II, the emergency never ended; the wartime institutions were never dismantled, the prerogatives never surrendered. The powers exercised by the President during the emergency did not revert back to the legislature or the people. Nor could they, given the goals and objectives of postwar American policy.

Truman and his advisors had global aspirations, designs fueled by great ambitions and great fears. The executive would manage a global responsibility; America would, in Acheson's view, inherit the mantle of Britain and Rome. Yet, imperial policies abroad - a policy of constant intervention and continuous engagement - required structural alterations in the "peacetime" executive at home. Thus, institutions designed in the executive for total warfare during World War II were legitimated for the postwar period.

These institutions were, as Samuel Huntington has reported, purposely designed to "isolate as far as possible foreign policy decisions from Congressional and public control." One could hardly manage an imperial mission under what William Bundy disparagingly called "the klieg lights of a democracy."

The institutional structure gave a new bureaucratic reality to the executive claims of a constitutional prerogative over questions of national

security. When President Nixon claimed the inherent power to make peace or war, to dispatch troops, to make commitments, to secret information from Congress, or to wiretap, or to break and enter under the banner of national security, which he would define to fit his purposes, he had some thirty years of practice to support his claim. The President was simply expounding the principles of a new constitutional order already inchoately established in the actions of the postwar imperial Presidency. As Ralph Stavins has suggested elsewhere, America was caught between two constitutional orders: the republican and the imperial.[7]

The Central Intelligence Agency exemplifies this imperial constitutional order. Its legal foundations, mission, secrecy, and relationship to the Congress provide a clear definition of the new political form which violates any republican framework. A republican order is premised on the rule of law and requires that the legislature define the charter of inferior executive offices and agencies; the CIA's mission is defined by secret charter developed in the executive, and dubiously pegged upon an excessively vague congressional statute. A republican order presumes disclosure and freedom of information; the CIA luxuriates in extreme secrecy. The former demands accountability to the legislature and the people; the latter avoids accountability as much as possible. The former is based on the assumption that peace is the normal state of affairs for the polity; the latter presupposes and supports continuous intervention, war and para-war. In every aspect of its existence, the Central Intelligence Agency represents an affront to the constitutional order of the republic, and a monument to the imperial aspirations of the executive.

II. Law v. Para-law: The Institutional History and Legal Foundations of the Central Intelligence Agency

The Constitution confers the "legislative powers" upon the Congress, a power extending to all laws "necessary and proper" for executing any provisions vested by the Constitution "in the Government of the United States, or in any Department or Office thereof."[8] As Hamilton put it, "The essence of the legislative authority is to enact laws, or in other words, to prescribe rules for the regulation of the Society."[9] Moreover, for the framers of the Constitution, the notion of law had both substantive and procedural content. A law must have a minimal substantive rationality: it must be related to the legitimate end for which it was passed. Further, the law could not be excessively vague or overbroad; the Congress was proscribed from delegating "essential legislative functions with which it is vested" to another body.[10]

The executive power is a power and duty to execute the laws; indeed, the very premise of a rule of law is the proposition that the executive is subject to law, and this proposition is precisely what distinguished the new republic from the monarchies of Europe. The distinction between the legislative and executive functions need not be overdrawn. Congress has the power to delegate authority to the executive. It may pass legislation which, having established the goals and standards, empowers the executive to elaborate directives and procedures to guide enforcement. Anyone familiar with administrative agencies and their history understands that such delegations can, particularly since the New Deal, be very broad indeed.[11]

Recently, however, we have witnessed the spread of a new form of law, law based upon executive initiatives which can only be termed legislative. The growth of executive power and prerogative has been accompanied by the spread of what might be termed para-law.[12] Para-laws are the internal regulations of the bureaucracy, premised either upon a claim to inherent power, or a grant of a broad and unchartered power from the legislature, or simply established without reference to any legal basis. The para-legal gives the appearance of legality, and regulation by law to executive agencies, without the reality of legislative determination and definition. It might be said to represent a transitional form between the rule of law, and the reign of a leader.[13]

The legal foundation of the Central Intelligence Agency provides a good example of the para-legal mode. The CIA traces its birth, not to an act of Congress, but to an executive order issued by Franklin D. Roosevelt in 1941, establishing an Office of Coordination of Information (COI) in the White House.[14] Headed by William "Wild Bill" Donovan, a non-pareil bureaucratic entrepreneur, the COI was transformed into the Office of Strategic Services (OSS) with the outbreak of the war. The OSS, acting in an atmosphere of total war, soon became engaged in widespread clandestine actions throughout the world, actions which, in the context of a war against fascism, were never questioned.

The OSS retained the same authority as the COI; yet the Roosevelt executive orders gave no indication of the scope of its activities. The orders contained no reference to covert operations, merely empowering the new office to coordinate, analyse and disseminate

intelligence information and estimates. The standard bureaucratic catch-all provision merely empowered the office to "carry out, when requested by the President, such supplementary activities, as may facilitate the securing of information.(emphasis added)" From this phrase, Donovon and Roosevelt derived a rather dubious legal authority for covert actions throughout World War II.

After the war, the OSS was disbanded, its functions transferred, divided and re-assembled - all by executive orders.[15] The intelligence office was re-organized as the Central Intelligence Group as Truman and his leading advisors negotiated truces between the different contending national security bureaucracies. Only when the Administration had lined up the various bureaucracies in support of a consolidated National Security Act, did it turn to Congress.

The National Security Act of 1947 sought congressional ratification of Ad hoc wartime institutions for peacetime. Admiral Nimitz testified that the bill was designed

> "to incorporate the lessons of the past war. It gives legal status to those co-ordinating and command agencies which were found most effective to the conduct of global war. This is a forward-looking bill (sic)."[16]

Title I Section 102 of the bill established the Central Intelligence Agency under the direction of the National Security Council.

This procedure was characteristic of the post-depression executive: executive initiative based upon emergency and necessity followed by Congressional ratification, legitimation or adoption. The procedure inverts the republican norm of congressional legislation and executive

ratification. In a very direct sense, it forces Congress to act as a veto on executive initiative and legislation, rather than the reverse. Congress, in this course of events, is at a supreme disadvantage to a unified executive. It has no opportunity to render a considered judgment ab initio. An example, by the time the National Security Act of 1947 was referred to Congress, the Central Intelligence Group already possessed a glamorous war-time history, and a galaxy of powerful friends and supporters. Moreover, the Administration had lined up all of the national security bureaucracy in favor of the compromise legislation, presenting Congress with one official after another attesting to the necessity of the legislation. Furthermore, since the intelligence agency already existed, the mystique of intelligence could be employed to limit debate, and impress the impressionable. When General Hoyt Vandenberg, head of the Central Intelligence Group, testified in favor of the legislation, he apologized for having to limit his testimony to protect activities from disclosure. Congress was given the decision of repudiating an agency rather than creating a new one. Needless to say, Congress passed the National Security Act without extended discussion of the Agency, its powers, duties, or activities.

The legislative charter of the Agency is far from clear. The Agency was authorized by law to

(See Addendum 10-A)

Addendum 10-A

1) advise the National Security Council in matters concerning such intelligence activities as relate to national security.

2) to make recommendations to the National Security Council for the coordination of such intelligence activities of the departments and agencies of the Government as relate to the national security, correlate and evaluate intelligence relating to the national security, and provide for the appropriate dissemination of such intelligence within the Government using where appropriate existing agencies and facilities;

3) provided, That the Agency shall have no police, subpoena, law-enforcement power, or internal security functions: Provided further, that the departments and other agencies of the Government shall continue to collect, evaluate, correlate and disseminate departmental intelligence: And provided further, That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure;

4) to perform, for the benefit of the existing intelligence agencies, such additional services of common concern as the National Security Council determines can be more effectively accomplished centrally;

5) to perform such other functions and duties related to intelligence affecting the national security as the National Security Council shall from time to time direct.

What passage empowers the Agency to conduct covert warfare throughout the world? The claim is that the fifth paragraph implied a congressional grant to engage in covert actions, even if, in the words of Richard Bissell, "necessarily vague."[17] Yet, the delegation of discretion to the executive in the fifth paragraph is limited to intelligence , and would not seem to include clandestine or covert operations unrelated to intelligence.

Because of the lack of attention paid to the CIA in the hearings, the actual legislative intent behind paragraph five is difficult to divine. Jerrold Walden has concluded that "at no time in the legislative history did Congress intend the CIA to engage in subliminal warfare."[18] Yet, since the language tracks that of the Truman executive orders, it is often assumed that Congress was aware that the Agency would undertake covert actions.*

Yet, the actual legislative intent of Congress is irrelevant to the executive. The 1947 act was to provide the CIA with the facade

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*This assumption may be unwarranted, however. Truman was widely reputed to be an opponent of covert action after the war. When he noted in 1963 that he had never intended the CIA to be involved in covert actions abroad, the states - of doubtful validity - might be seen as reflecting his original intentions. Moreover, the House Committee on Military Affairs had, in 1946, recommended the establishment of a Central Intelligence Agency, without a covert action component.[19] When Donovon was lobbying for a continuation of OSS after the war, he wrote a memoranda to Roosevelt detailing the functions of an intelligence agency, including an open suggestion of involvement in covert actitities. The memoranda was leaked to the press (by FBI Director Herbert Hoover, according to R. Harris Smith), and the resulting Congressional furor caused Truman to delay any action on the Agency.[20]

of legitimacy. H. H. Ransom has noted, the "real constitution of the CIA is not so much the statutory authority, but the National Security Council Directives."[21] Secret NSCIDs form the operative charter for the Agency, the para-legal basis for its activities at home and abroad. Thus the statutory basis of the Agency has no meaning for bureaucratic purposes: its direction comes not from the law, but executive directives, which are open neither to Congressional nor popular review, and which may even conflict with other aspects of the 1947 bill.[22]

The Agency is thus a pristine example of the para-legal institution. Founded by executive order to meet a wartime emergency, it was ratified by the Congress for the post-war period. Yet, the ratification provided only the veneer of Congressional complicity, for the legislative charter defining the Agency's activities were issued within the executive, para-legal secret directives for the President's army. The rule of law central to a republic was supplanted by the secret orders of an imperial executive.

III. Covert Actions and Executive War-Making

To the framers of the Constitution, the executive was to be particularly mistrusted in matters of war and peace. an axiom being that, in Madison's words, "The executive is the department of power most distinguished by its propensity to war: Hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence." The history of European monarchies had impressed upon the colonists the dangers of empowering one man to commit the nation to war.

Rulers tended to make war for reasons of personal ire or ambition, thereby wasting the lives and resources of the populace. As James Wilson wrote, the power to declare war must be lodged in the Congress as guard against "being hurried" into war, so that no "single man (can) ...involve us in such distress."[23]

Thus, Congress was given the war power. In Wilson's summary:

> The power of declaring war, and the other powers naturally connected with it, are vested in Congress. To provide and maintain a navy -- to make rules for its government -- to grant letters of marque and reprisal -- to make rules concerning captures -- to raise and support armies -- to establish rules for their regulation -- to provide for organizing...the militia, and for calling them forth in the service of the Union -- all these are powers naturally connected with the power of declaring war. All these powers, therefore, are vested in Congress.[24]

Moreover, the legislature was granted a large role in foreign affairs short of war. The executive, characterized by the "unity, secrecy and dispatch" necessary for foreign negotiations, was to control the day-to-day management of foreign affairs. Yet, the executive's powers were to be shared with those of the Congress. Treaties and commitments required the advice and the consent of the Senate, and it was assumed that the leaders of the legislature would participate early and frequently in negotiations. Thus, Presidential license to commit the nation to alliances, or to involve it in war was severely circumscribed by the Constitution. Even McDougald and Lens, two ardent exponents of executive license, noted that the original

assumption was that the Senate would sit as an executive committee to advise the President.*

Initially, of course, the constitutional division of power was buttressed by institutional realities. The standing army and navy were miniscule throughout our early history, and although active Presidents often chafed at constitutional restraints, little more than a skirmish could be fought without recourse to Congress. Also, the executive was yet small and responsive, the Congress vigorous and, if not wise, at least cantankerous and jealous of its powers.

The purposes behind this separation of powers was most clear. The framers knew that for a republic to survive, war would have to be an abnormal and temporary state of affairs. War, as Senator Fulbright has suggested, fostered traits alien to a republic; secrecy rather than openness, deceit rather than honesty, suspension of humanitarian impulse rather than its propagation.

Today, we have virtually abandoned these careful restraints and guidelines. In foreign affairs, wrote Senator Fulbright

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*There was, no doubt, an area of emergency power assumed in the Presidency. The President, as Commander-in-Chief, was empowered to fend off attacks on the United States. Further it is probable that the founders believed in a Lockean prerogative in emergency. To protect against internal insurrection, civil war or similar extreme situations, the President might act by necessity, without legal authority, beyond the scope of the Constitution to protect the state. But, recourse to prerogative powers would be limited in duration, and afforded only in the most extreme situations. The President's actions would be viewed as supra-Constitutional, creating no precedent for future instances. Moreover, the President would have to seek the agreement of the legislature and the people - that the emergency did exist and that his actions were, in fact, necessary and wise. Denying its approval, the legislature might impeach and convict. Denying its approval, the citizenry would have just recourse to rebellion and revolution.

"It may not be too much to say that as far as foreign policy is concerned, our government system is no longer one of separation of powers, but rather one of elected, executive dictatorship."[25] Every president since Roosevelt has waged war or para-war abroad without prior approval by Congress. Executive war can be undertaken in secrecy, funded through an array of secret monies, planned in secret sessions in the White House, and a President may employ in either overt or covert bureaucracies to carry out his designs.[26]

Secret wars sponsored by the CIA are but one aspect of this new executive dictatorship over questions of war and peace. The Agency sponsors continuous covert engagement abroad. It offers the President a variety of seductive clandestine alternatives - ranging from bribery to full-scale warfare - to gain whatever objectives may be defined for the area. Shrouded in secrecy and deception, the Central Intelligence Agency contributes a clandestine praetorian guard which the President can dispose at his will (provided he can gain Agency concurrence).

Continuous engagement totally erodes the distinction - so important to the republic and the congressional powers - between war and peace, intervention and withdrawal. Engagement is constant; each escalation is based on a prior bureaucratic record and commitment. Thus, Congress can never be in the position to declare war or to make a commitment without being faced with a long bureaucratic history of meddling and promises. War or para-war become the constant state of the polity; the President ever speaks as Commander-in-Chief; the power of Congress and the energy of the people are eroded in executive gambols and interventions abroad. The incompatability of secret warfare to a

republican order is apparent without further elaboration. No legal rationale can be invented to legitimate these aspects of the CIA's activities.*

IV. Secrecy: The Budget of the Central Intelligence Agency

In 1949, Congress passed the Central Intelligence Administration Act at the behest of the Truman Administration.** [27] The Act established the regulations which would direct the administration of the new agency in its operation. The legislation takes the form of a series of exemptions freeing the Agency from the general laws designed by Congress to regulate the affairs of executive bureaucracies. Thus, the agency was empowered to contract by negotiation without advertising, to bring up to 100 aliens into the country annually without following immigration procedures, to hire and fire employees without regard to civil service regulations or requirements, etc. Most important, the Act provided that appropriations or other monies made available to the Agency "may be expended without regard to the provisions of law and regulations relating to the expenditure of government funds;" and that for "objects of a confidential, extraordinary or emergency nature," expenditures may be authorized solely on the certificate of the Director. Finally, it permitted the CIA to transfer to and receive from other governmental agencies such sums as may

*Thus, Congress cannot be said to have delegated its power to declare war, an unconstitutionally broad delegation, especially without express provision in the CIA Act of 1947. (CF. Wayman v Southard 23 U.S.(10 Wheat) (1825).) Nor can Congress be said to have ratified such wars, since the secrecy surrounding the activities and budget of the CIA vitiates any strength such an argument might have. (Fleming v Mohawk Co. 331 U.S. 116 (1947).)

**The procedures surrounding the passage of this bill once again exemplify the CIA's estrangement from normal legislative procedures. The hearings on the bill in both the House and the Senate were held in executive session. Both reports simply reprinted the provisions of the bill without further

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be approved by the OMB. These provisions gave legislative approval to an Agency budget, hidden in the interstices of the federal budget, which neither Congress nor the public could divine.

Since the passage of the bill, the budget figures of the Central Intelligence Agency have become a dearly savored secret in both the executive and Congress. In 1953, Acting Director of the CIA, C. P. Cabell, in response to inquiry by Senator Mansfield, wrote that the "CIA appropriation figure is very tightly held and is known to not more than five or six Members in each House."[29] To this day, the budget figures are known to only a handful of Congressmen and bureaucrats, and the budget itself is sent to Capitol Hill with a SECRET classification for approval by Congress. In both the House and the Senate, the figures are shown only to a few generally sympathetic Congressmen on the Defense Appropriations Subcommittees of the House and Senate and not generally shared with all members of the subcommittee.[30]

**(Continued) explanation or elaboration. Representative Short of Mississippi expressed the common assumption,"We are engaged in a highly dangerous business. It is something I naturally abhor...(but)there is no way out of it so far as I can see, and perhaps the less we say in public about the Bill the better off all of us will be."

Only Victor Marcantonio, the firebrand New York Congressman, recorded his objections for the record:

This is the first time in the history of Congress that members are being asked to vote on legislation about which not merely information is withheld, but also explanation as to the provisions of the legislation. ...No member of Congress has been informed; ...only the members of the Committee on Armed Forces...

Congress is suspending its right to legislate and we are being asked to do this in furtherance of the cold war...I refuse to believe that our nation is so unsafe from a security standpoint that we have to suspend... the legislative prerogatives of the representatives of the people in Congress...[28]

The Bill passed 348 to 4.

This carefully bolstered secrecy directly contravenes of Article I Section 9, Clause 7 of the Constitution, which provides:

> No money shall be drawn from the Treasury, but in consequence of Appropriations made by Law; and a regular Statement of Account of the Receipts and Expenditures of all public money shall be published from time to time.

The object of the clause, as Story wrote, is "clear upon the slightest examination." its wording is not discretionary, but places a positive limitation and duty upon the legislature and the executive. In his commentaries on the Constitution, Story contrasted the provision with the practice "in arbitrary governments, (where) the prince levies what money he pleases from his subjects, disposes of it as he thinks proper and is beyond responsibility or reproof...(In a republic) Congress is made the guardian of (the public treasure); and to make their responsibility complete and perfect, a regular account of the receipts and expenditures is required to be published, that the people may know what money is expended for what purpose and by what authority."[31] For the founders, the major question concerning the clause was whether the phrase "time to time" was sufficiently well-defined to insure a periodic accounting. The purpose of the clause was not for the protection of Congress, but the people. During the Maryland debates on the Constitution, James McHenry said that "The people who give their money ought to know in what manner it is expended." In New York, Livingston reassured the delegates, the clause, he thought, will protect the people from a corrupt Congress, as publication of the budget from year to year would soon expose any corruption.[32]

The clause was, thus, directly related to the notion of informed consent, so important to the American law. Obviously, consent could not be given unless the people could evaluate the cost, the purposes and the

activities of the government. To be sure, some matters might require secrecy. Mason in the Virginia debates thought that secrecy might be necessary (temporarily) "in matters relating to military operations and foreign relations," but "he did not conceive that the receipts and expenditures of the public money ought ever to be concealed. The people," he affirmed," had a right to know the expenditures of their money."[33]

Thus, the CIA's budgetary procedures appear to contravene an express clause of the Constitution. With Congress complicitous with the executive in the CIA Act, the only recourse was to the courts. In 1967, 48-year old William B. Richardson, an insurance claims examiner in Greensburg, Pennsylvania, "a member of the electorate and a loyal citizen of the United States," brought suit in federal district court challenging the constitutionality of the secret funding of the CIA, and demanding an accounting of its expenditures. In 1972, the Third Circuit Court of Appeals, sitting en banc, upheld his standing that "if appellant, as a citizen, voter and taxpayer, is not entitled to maintain an action such as this to enforce the dictates of Article I, Section 9, Clause 7...then it is difficult to see how this requirement, which the framers of the Constitution considered vital to the proper functioning of our democratic republic may be enforced at all."[34]

The Court of Appeals' decision was overturned by a 5-4 decision of the Supreme Court on June 25, 1974. The Court, speaking through the pen of Chief Justice Berger did not reach the merits of the claim, but ruled that as a taxpayer, Richardson had no standing to bring the suit.

"Any other conclusion", wrote the Chief Justice, "would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government..."[35]

The court's decision turned on standing to sue, rather than the merits of the case. In dissent, Mr. Justice Douglas touched upon the substantive issue, noting that

> The sovereign in this Nation are the people, not the bureaucracy... The statement of accounts of public expenditires goes to the heart of the problem of sovereignty. If taxpayers may not ask that rudimentary question, their sovereignty becomes an empty symbol and a secret bureaucracy is allowed to run our affairs.[36]

The reluctance of the least powerful branch to assert itslef in the area does not diminish the stark contrast between the secret budgetary provisions for the Central Intelligence Agency, and the spirit and letter of our Constitutional order.*

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* It would seem the Constitutional violation cannot even be justified by the CIA's definition of national security. Both James Schlesinger and William Colby recently testified that publication of the aggregate budget would not violate national security. (Colby quickly redefined his position, saying that any disclosure might stimulate requests for additional information and might, therefore, be dangerous.)[37]

V. Secrecy and Prior Restraint: The CIA and the First Amendment

Every form of government demands its secrets, and a republic is no exception. Although the founders made no provision for executive secrecy in the Constitution (which provided only for congressional secrecy), some secrecy in operation was no doubt assumed as part of the process of government. In diplomatic negotiations, Jay observed in the 64th Federalist, "perfect secrecy and immediate dispatch are sometimes requisite...; and the most useful intelligence may be obtained if the persons possessing it can be relieved of the apprehension of discovery."[38]

Yet secrecy was also inherently suspect. "A popular government, without popular information or the means of requiring it," Madison wrote, "is but a prologue to a farce or a tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who aim to be their own governors must arm themselves with the power that knowledge gives."[39] Disclosure and freedom of information was, therefore, an important aspect of a government based upon consent and participation.

From the beginning of the republic, a continued tension between secrecy and disclosure was established. Repeatedly, the executive would seek to act secretly without informing the public; and time after time, concerned citizens would seek to learn the secrets and publish the information. As early as 1795, President Washington laid the Jay treaty before the Senate in secret session. Senator Mason of Virginia, in vehement opposition, sent the document to the Jack Anderson of his day, Benjamin Franklin Bache of the Philadelphia Aurora, who promptly published it to spark public outrage.

Government officials have made repeated attempts to squelch such

activities, beginning with the infamous Sedition Acts of 1798, which provided the statutory basis for criminal prosecutions against newspaper editors. Yet, out of this struggle grew a rather strong notion of free expression, particularly freedom of the press. At the core of this constitutionally protected area of activity was a historic commitment against prior restraint of speech. In 1931, this principle received a clear enunciation by the Supreme Court in Near v. Minnesota. Chief Justice Hughes, reviewing the adoption of the First Amendment, laid down the basic rule

> ...Liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship.[40]

While subsequent criminal prosecution or civil damages might be available for abuses, prior restraint was not. Not even the Sedition Laws impowered the executive to impose a prior restraint upon publication.

There was something of a contradiction here because government secrecy could be viewed as classic prior censorship or prior restraint. Secrecy serves many purposes for the executive, a major one being the control of information available for public consideration. As secrecy spread throughout the executive, and was formally established in a system of classification in a Truman executive order, its possibilities for information manipulation became clearer and clearer.

Even though government secrecy was formulated by a para-legal classification system, there was never statutory (or even para-legal) authority for prior restraint. Congress did pass the Espionage Acts, vague laws basically aimed at providing criminal sanctions against spies.

It also passed legislation giving recognition to the executive secrecy system. In the case of the CIA, the Director was empowered in the National Security Act of 1947 to "protect intelligence sources and methods from disclosure." [41]

The CIA established an elaborate security and secrecy system, one fitting its clandestine and furtive character. Every Agency employee - in addition to loyalty and security tests - signs a "secrecy agreement" upon entering and leaving the Agency. The official pledges never to reveal any secret information to unauthorized persons, and recognizes a governmental "property right" in the "information or intelligence (not simply the documents) or any method of collecting it."* [42] The contract is replete with misleading mutterings about criminal liability.

For years this system worked quite effectively. Retired agents sent in their books for "clearance " by the Agency. The Agency's control over secrets was the best in town; its authorized leaks and tales almost as effective as those of J. Edgar Hoover. As long as the Agency's mission was clear and popular, as long as its officials enjoyed a high esteem and morale in the Cold War years, its only problem with leaks were those that its Directors authorized or those employed in bureaucratic in-fighting (an unavoidable practice in Washington). More generally, the post-war classification system increased the level of information control to new heights, but did not result in infringement on the First Amendment right against prior restraint.

*It is indicative of our condition that the executive claims a right to privacy much greater than that of the citizen. Suggestions in congressional hearings that information about a person be treated as a property right elicited incomprehension and mirth.

Yet on April 18, 1972, representatives of the Central Intelligence Agency entered the District Court for the Eastern Districts of Virginia seeking an ex parte temporary restraining order and a permanent injunction against one Victor Marchetti, an ex-Agency official. The terms of the injunction required that Marchetti submit all of his writings to the Central Intelligence Agency for "clearance" prior to publication, and that he cease violating his "secret agreement" in speech or writings for the remainder of his life. The District Court issued the permanent injunction on May 19; its decision was substantially affirmed by the Court of Appeals; the Supreme Court denied certiorari.[43]

This tragic moment in our legal history warrants more attention. The order constituted the first prior restraint against publication of political speech in our nation's history. It resulted in a book replete with the deletions of a government censor, a graphic testament to this deplorable ruling. A closer look at the case, moreover, reveals how shocking the decision was.

First, the District Court and, to a lesser extent, the Court of Appeals, essentially ignored the arguments based upon the First Amendment. The case was said to concern enforcement of an employment contract, not freedom of speech. The argument that the government could not enforce an agreement in violation of the First Amendment did not impress the Court. Thus, both the District Court and the Fourth Circuit Court of Appeals ignored the standard established by the New York Times Pentagon Papers case, requiring "direct, immediate and irreparable injury to the United States" for an injunction to be granted.[44] The Court of Appeals instead substituted a bureaucratic test: the information had to be

classified to qualify for injunction and censorship, obtained in the course of employment, and not previously in the public domain.* This standard would, if generalized, empower the executive to enjoin and censor the writings of virtually any former employee.

A second extraordinary aspect of the Marchetti case was the basis for the decision. There existed no statutory basis for injunctive relief of the Agency's complaint. Indeed, Congress had frequently failed to pass statutes aimed at providing such relief. The Agency could sue Marchetti for damages, it could attempt to prosecute him under the Espionage Laws; but it had no statutory basis for standing in a suit to enjoin. Indeed, William Colby, in a legislative proposal to the OMB on January 14, 1974, complained that, "There is no existing statutory authority for injunctive relief." [45]

In proceeding against Marchetti, the Agency based its standing on "the government's interest in protecting the national security," a claim of inherent executive power to bring the action to protect the nation. [46] Thus, to reach its unprecendented result, the court first had to accept a virtually unprecedented assertion of an inherent executive right to bring suit.**

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*The Agency initially sought to limit the scope of this term. One official suggested only information disclosed by the executive branch be considered in the public domain. Congressmen, presumably, dealt only in rumor and unfounded speculation.

**The precedent used by the Court was in re Debs, a deplorable decision allowing injunctive relief against Debs, who was leading a strike against the railroads at the time. The step taken by the District Court in Marchetti was explicitly rejected by at least one judge in the Pentagon Papers case. Mr. Justice White concluded that, "In the absence of legislation by Congress...I am quite unable to agree that the inherent powers of the executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press.[47]

Chief Judge Haynsworth, writing for the Court of Appeal, was prepared to go even further. He suggested that had there been no secrecy agreement, "The law would brobably imply a secrecy agreement," to enforce a system of prior restraints. The judge went on to suggest that the operations of the CIA, "closely related to the conduct of foreign affairs and to the national defense..., are an executive function beyond the control of the judicial power." Thus, the process and validity of classification is part of the executive function beyond the scope of judicial review. Judge Haynsworth apparently did not see any contradiction between declaring a matter beyond the control of the judicial power, and using that same power to enforce it.[48]

A third aspect of the Marchetti case merits further attention. The Agency was not satisfied with its ad hoc victory over Marchetti. In January 1974, William Colby submitted to the OMB a draft bill to amend the National Security Act of 1947. The bill proposed a virtual equivalent of an Official Secrets Act to protect the secrecy of the Central Intelligence Agency. The legislation proposes criminal penalties against persons who have authorized possession of classified information and willfully disclose it to unauthorized persons. It also seeks statutory authority for the Marchetti injunction, an injunction to be levied upon a showing by the Director of the Central Intelligence Agency that a violation of Agency security is threatened. [49]

This extraordinary legislation would give the heads of the Agency a virtual carte blanche in controlling information released about it. To be sure, the proposal is geared to the moderate temper. It provides for judicial review of the validity of the classification - no doubt in full

knowledge that approval would be no more difficult than receiving a warrant from a magistrate is for the FBI. The proposed legislation also exempts information provided "upon lawful demand to any regularly constituted committee of the Senate or the House." Given the scope of modern claims to executive privilege, that standard could virtually end the flow of embarrassing information being passed to Congress, and would certainly diminish a major source of congressional knowledge: the unauthorized leak of information to a concerned congressman.

The Director claims the legislation is necessary in order to provide "adequate protection of the intelligence sources and methods..." For some this argument in itself would illustrate the incompatibility of the Agency's mission with a republican constitutional order. Rather than review the arguments for and against secrecy, however, consider the question of why the Agency is proposing such legislation now?

The Agency's secrecy system (reinforced by the inherent bureaucratic fanaticism about secrecy, and the mystic aura of a secret society) was self-enforcing for twenty years. Some ex-Agency hands submitted their books for review, others (Tom Braden and Miles Copeland, for example) did not. It was a matter of small importance for all were loyal and proud of the Agency. It was only when the Agency's role abroad came under widespread criticism, when the easy Cold War assumption that criminal activity abroad was justified in the name of democracy was dispelled - only then did the secrecy system not suffice. Given a widespread societal debate, not even the most secret of organizations could withstand the personal urge to reconsider and reassess, and the personal moral agony of a drastic change in perspective.

For the citizenry, it is precisely at such moments that information must be available, so that a serious and informed review and reconstruction can proceed. Until a new consensus is formed, it is imperative that the much maligned "marketplace of ideas" be open to all points of view. Needless to say, this perspective violates all of the "requirements" of a covert agency. Its sources are damaged by open debate; its effectiveness reduced; its agents may be endangered. Thus, the CIA was forced to seek judicial and legislative support for its secrecy system. Its recourse to the courts illustrates both the need for and fear of public discussion, of public reconsideration.

Like Judge Haynsworth, I would suggest that secrecy be considered an executive function: they should try to keep secrets and the press and people should try to expose them. Neither criminal nor injunctuve sanctions should disturb this struggle. No doubt, this does not meet the requirements of an effective clandestine agency. Again, the dictates of a clandestine agency seem to conflict with the principles of a healthy polity, founded on the consent of the people.

1/ The quote is from Senator Stuart Symington, Hearings on the nomination of William E. Colby, Senate Armed Services Committee, 93rd Congress, 1st Session, 1970 p 29.

2/ Myers v United States 272 U.S. 52, 293 (1926)

3/ Corwin, The President: Office and Powers, 4-5 (3rd Ed. 1948)

4/ The Federalist No. 51 at 350 (Cooke ed, 1961) (James Madison)

5/ Arendt, Crises of the Republic (New York 1972) p 85

6/ Huntington

7/ Much of this paper is derived from discussions with Ralph Stavins, A fellow at the Institute for Policy Studies.

8/ Article I, Section 8

9/ The Federalist No. 75 at 504 (Cooke ed) (Alexander Hamilton)

10/ Schechter Poultry Corp v United States 295 US 495, 529 (1935)

11/ See generally Jaffe, An Essay on Delegation, 47 Col L Rev 339 (47)

12/ See Raskin, Notes on the Old System (1974)

13./ IBID at p 139

14/ Roosevelt, Letter of July 11, 1941 3CFR 1324 (38-43

15/ Executive Order #9605 10 FR 11223 (1945)
Executive Order #9621 10 FR 12033 (1945)

16/ 61 Stat 495 (1947) See Sorusage, The Making of the National Security State, The Pentagon-Watchers (1973)

17/ quoted in Marchetti and Marks, The CIA and the Cult of Intelligence, p. 393 (1974)

18/ Walden, the CIA: A Study in the Arrogation of Administrative Powers, 39 George Washington Law Review, 66, 84 (1970)

19/ House Committee on Military Affairs, Investigation into the National War Effort, Report No. 2734, 79th Congress, 2nd Session, (1946) p.5

20/ R. Harris Smith, The OSS, p. 363

21/ Ransom, National Security and Central Intelligence

22/ See Congressional Record, August 1, 1973, S. 363:
Symington:"... those directives from the National Security Council, at least in the minds of some people, in effect go against the legislation which created the agency itself."

23/ Elliots Debates 528, (end Ed 1836) (Wilson)

24/See generally Berger, War-Making by the President, 121 U Pa. Law Review 29 (1972)

25/ Fulbright

26/ e.j. The Secret Bombing of Cambodia and the Secret Army in Laos. No Distinction Remained Between the Overt and Covert Agencies.

27/ 63 Stat 20S (1949)

28/ Congressional Record, March 7, 1949, at H. 1946

29/ Congressional Record, March 10, 1954 S281

30/ Se generally a goodstudy of oversight
McNamee, Sandler and Tenenbaum, Congressional Oversight of the Central Intelligence Agency (unpublished)

31/ Story, Commentames, Volume II #1342, 213

32/ See Richardson v United States 42 LW 5086 (1974)

33/ Elliot's Debates (2nd Ed) 1459

34/ Richardson v United States 465 F2d 844, 853